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In The

Supreme Court of the United States

77-1722

October Term, 1977

No.

LAWRENCE DALIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

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No.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT**

The petitioner, Lawrence Dalia, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 3, 1978.

OPINIONS BELOW

The Court of Appeals for the Third Circuit filed an opinion on May 3, 1978. That opinion and the opinion of the United States District Court for the District of New Jersey dated

January 11, 1977 appear in the appendix hereto. The trial court opinion is officially reported as *United States v. Dalia*, 426 F. Supp. 862.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 3, 1978. This petition for a writ of certiorari has been filed within thirty days of the entry of that judgment. The jurisdiction of the United States Supreme Court is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May Government agents commit an otherwise illegal breaking and entry in order to install, maintain and remove electronic listening devices when lawful authority to intercept oral communications has been granted pursuant to Title III¹ but when no authority to commit a breaking and entry has been sought or obtained and the supervising court has not been advised of the manner of the proposed entry or installation?

2. May a sentence imposed within the statutory limits be the subject of appellate review?

STATEMENT OF FACTS

The petitioner Lawrence Dalia was indicted for his alleged role in transporting, receiving and possessing stolen goods. He was found guilty on two counts of a five-count indictment and sentenced to serve two concurrent five-year terms. A co-defendant, Daniel Rizzo, who was alleged to have been a hijacker of the interstate shipment pleaded guilty prior to the commencement of the trial.

1. "Title III" refers to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et. seq.*

Prior to the indictment of Lawrence Dalia and Daniel Rizzo, five other persons had been indicted for their respective roles in the hijacking of the interstate shipment and their transporting, receiving and possessing the stolen goods. These five individuals all pleaded guilty and were sentenced before return of the indictment of petitioner Dalia.

Pursuant to a request by the United States Department of Justice on March 14, 1973, Judge Frederick B. Lacey granted authorization to intercept telephone communications from two telephones located at petitioner's place of business in Linden, New Jersey. The authorization for the wiretap extended for twenty days. Upon expiration of the initial order, the United States Department of Justice applied for a new order authorizing continued wire interception of the two business telephones of the petitioner. In addition, the application sought permission to intercept oral communications of petitioner Dalia occurring within his private business office. On April 5, 1973, Judge Lacey authorized interception of oral communications taking place within the petitioner's office. No reference was made in the application or the order with respect to the manner in which the oral communications would be intercepted nor was the court informed that a break-in was contemplated (Tr. 9-21 to 1.10-16).

On the night of the issuance of the order and extending into the early morning hours of the next day three special agents of the Federal Bureau of Investigation broke into the office of petitioner Dalia. They received no instructions from the court or any attorneys from the Department of Justice with respect to their proposed activities while on the premises of the petitioner (Appellate Appendix, pp. 106, 112).² After searching the entire building for "safety" reasons (A107) the agents proceeded to install a listening device in the ceiling of the petitioner's office

2. Reference to the Appellate Appendix filed with petitioner's appellate brief is hereinafter referred to as "A".

(A110). This listening device enabled the agents to overhear and record all conversations taking place in the petitioner's office for twenty days. At the conclusion of that order a third application was made to Judge Lacey to continue the interception of telephone communications on the business phones and the interception of oral communications in the petitioner's office. Again, no mention was made in the application or order with respect to the manner of interception of oral communications at the inception of this third twenty-day period. No informal advice was given to the court as to what had occurred when the device was installed nor was any informal advice about any contemplated break-in disclosed (A114).

Without any prior notification to the court, two agents re-entered petitioner's office on May 16, 1973 and removed the electronic equipment. On both occasions the break-in was accomplished by entering through a window during the late night or early morning hours. The agents were in the petitioner's premises for two or three hours on the first occasion (A111) and between one-half to an hour the second time (A112). No reports or records were made by the agents with respect to their entry nor was the court advised of what had occurred after the termination of the third order or after the second break-in (A106, 114; Tr1.9).

A timely motion to suppress the results of the electronic surveillance was made on several grounds. One basis was that the unauthorized breaking and entry was a violation of the Fourth Amendment of the United States Constitution. A second basis for suppression was a contention of the petitioner that the Government had greatly exaggerated the number of incriminatory conversations being overheard in the five day Progress Reports submitted to the supervising judge in order to justify continuation of the eavesdropping and wiretapping. The recorded office conversations and intercepted telephone conversations resulted in tape recording more than 1,500 hours of reels. Over 5,000 telephone conversations were recorded and

more than 1,150 separately designated conversations were overheard and recorded from petitioner's private office.

Although the motion to suppress was made prior to trial, an evidentiary hearing was not entertained until the conclusion of the trial. It resulted in an opinion of the court dated January 11, 1977 denying the motion. The court then sentenced petitioner to a maximum five-year term sentence on each of the two counts upon which he was convicted; the term sentences to run concurrently. The petitioner had no prior criminal record. Of the six individuals who had previously been charged with offenses arising out of the criminal transaction for which petitioner was convicted, only the petitioner Dalia and another named Joseph Higgins played no role in the actual hijacking. With respect to Higgins, he was alleged to have stored the stolen goods on his property after the hijacking. The petitioner Dalia's role allegedly was to refer other convicted defendants to Joseph Higgins in return for which Higgins presumably would have forwarded a sum of money to petitioner. Upon sentencing Joseph Higgins for his role in the criminal transaction, Judge Lacey had imposed a three-year probationary sentence. As noted, Judge Lacey imposed a five-year term sentence upon petitioner Dalia. Only Dalia had chosen to contest the charges.

The United States Court of Appeals for the Third Circuit affirmed the conviction and sentencing of petitioner Dalia in an opinion filed May 3, 1978. No discussion was given to petitioner's argument that the sentence imposed was an abuse of discretion remediable upon appeal other than to recognize that the point had been raised. The opinion of the Court of Appeals dealt primarily with petitioner's contention that a breaking and entry to install a listening device without first obtaining judicial approval is a violation of the Fourth Amendment. After acknowledging the fact that other circuits agreed with petitioner's contentions, the Court of Appeals stated:

"We accept Judge Lacey's finding that a surreptitious entry was the most effective means for installing the interception device as well as his finding that the installation was based upon probable cause and executed in a reasonable fashion.³

However, the Court of Appeals was not willing to reject unequivocally petitioner's contention. The Court of Appeals added:

"In rejecting appellant's contention in this case that separate authorization was required for the forcible surreptitious entry, we do not adopt a rule that specific authorization is never required. In the future, the more prudent or preferable approach for Government agents would be to include a statement regarding the need of a surreptitious entry in a request for the interception of oral communications when a break-in is contemplated. This burden is minimal in light of the Fourth Amendment considerations that could be later raised."

In a footnote, the Court of Appeals seemed to invite the United States Supreme Court to clarify the issue with the following observation:

"When the request to intercept oral communications was made in 1973 in the instant case, the Department of Justice was not on notice

3. A review of the trial judge's opinion indicates the court made no finding prior to the break-in that the particular installation was based upon a showing of probable cause or that the installation was performed in a reasonable fashion. Any such "finding" was made almost four years after the break-in. No evidence was ever produced on the motion to suppress to give factual support to the conclusion that the intrusion was the only feasible manner of accomplishing the eavesdropping.

of any conflict among the Circuits. Since that time, absent a Supreme Court decision, there has developed an irreconcilable conflict among the various Courts of Appeals."

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals for the Third Circuit is in direct conflict with holdings of the courts of appeals for two circuits which have required prior authorization for a surreptitious forced entry to install or remove electronic eavesdropping devices.

The Court of Appeals for the Third Circuit in deciding the case at bar conceded that on the issue presented, "there has developed an irreconcilable conflict among the various courts of appeals." Within the last two years, the issue of surreptitious entries to effectuate electronic eavesdropping has been the subject of a decision by five courts of appeals. In two circuits, the District of Columbia and the Fourth Circuit, the petitioner's motion to suppress most certainly would have been granted and affirmed on appeal. In two other circuits, the Second and now the Third, the courts of appeals have held that prior court authorization to break and enter to install electronic listening devices need not exist once a valid authorization to intercept oral communications has been granted. It is probable that the Court of Appeals for the Eighth Circuit would require prior authorization before allowing a break and entry to install a listening device.

In *United States v. Ford*, 553 F. 2d 146 (D.C. Cir. 1977), the court was faced with electronic eavesdropping which had been accomplished by installing a listening device by way of a ruse. Pretending to evacuate a building because of a bomb threat, Government agents used the time to install electronic

listening devices. They had previously discussed the matter with the court supervising the Title III application. The court had specifically permitted the Government agents to

"Enter and re-enter . . . for the purpose of installing, maintaining and removing the electronic eavesdropping devices. Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry or entry and re-entry by ruse and stratagem." *United States v. Ford*, 553 F. 2d 146, 149 (D.C. Cir. 1977).

Both the District Judge as well as the Court of Appeals held that this authorization was constitutionally overbroad. The District Court Judge in *Ford* held that the warrant gave the police "virtually unrestrained discretion in installing a surreptitious listening device." *United States v. Ford*, 414 F. Supp. 879 (D.D.C. 1976). The Court of Appeals fully concurred with the District Court's analysis, *United States v. Ford*, *supra*, at pp. 154-55, 165-70, and held that a break-in must be subjected to independent Fourth Amendment scrutiny by a neutral and detached magistrate upon oath or affirmation. The Court of Appeals in *Ford* held that, "When police seek to invade, surreptitiously and without consent, a protected premises to install, maintain, or remove electronic surveillance devices, prior judicial authorization in the form of a valid warrant authorizing that invasion must be obtained." 553 F. 2d at 165.

In *Application of the United States*, 563 F. 2d 637 (4 Cir. 1977), the Government had sought a specific authorization to make surreptitious entry into the premises of gambling suspects. The District Judge denied the order holding that while sufficient cause existed to satisfy the Title III requirements for permission to electronically eavesdrop, an insufficient showing was made to justify a forcible surreptitious entry.

Upon the Government's appeal to the Court of Appeals, it was held:

"The District Court was thus correct insofar as it subjected the request for authorization of surreptitious entry to separate Fourth Amendment consideration. Since in the absence of exigent circumstances, the Fourth Amendment commands compliance with the warrant requirement, we would normally countenance secret entry by federal agents for the purpose of installing, maintaining, or removing listening devices only under the following conditions: (1) where, as here, the District Judge to whom the interception application is made is apprised of the planned entry; (2) the judge finds, as he did here, that the use of the device and the surreptitious entry incident to its installation and use provide the only effective means available to the Government to conduct its investigation; and (3) only where the judge specifically sanctions such an entry in a manner that does not offend the substantive commands of the Fourth Amendment." 563 F. 2d at 643-44.

In *United States v. Agrusa*, 541 F. 2d 690 (8 Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977), the court upheld a surreptitious entry because the order specifically authorized the break-in. The majority in *Agrusa* acknowledged the holding might be different if the supervising judge did not specifically authorize the break-in. 541 F. 2d 696, fn. 13. The court limited its decision by the following language:

"We hold that law enforcement officials may, pursuant to express court authorization to do so, forcibly . . . enter business premises. . . .

We express no view on the result which obtains when one or more of these factual variants is altered."

The other side of the issue presented in this petition is found in *United States v. Scafidi*, 564 F. 2d 633 (2 Cir. 1977), *cert. denied, sub. nom. Vigorito v. United States*, 46 L.W. 3704 (May 15, 1978). There, the court held that an order authorizing electronic surveillance carries,

"its own authority to make such reasonable entry as may be necessary to effect the 'seizure' of the conversation.

* * *

We, therefore, hold that when an order has been made upon adequate proof as to the probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required." 564 F. 2d at 640.

The Court of Appeals for the Third Circuit in deciding the case at bar, grounded its decision upon the holding of *United States v. Scafidi, supra*. While recognizing the "irreconcilable conflict among the various courts of appeals" the Third Circuit did not give any reasoning why it favored the *Scafidi* rule over the rule set out in *Ford* and *Application of the United States*. Compounding the difficulties in attempting to find consistency in the circuits, the Eighth Circuit was asked to rehear *United States v. Agrusa, supra, en banc*. 541 F. 2d 704. The court was evenly divided and the petition for rehearing was consequently denied. However, the four dissenters in the Eighth Circuit indicated they had "grave doubts" that *any* judicial order authorizing a break and entry would be valid.

In addition to the foregoing cases, a District Court within the Sixth Circuit, in *United States v. Finazzo*, 429 F. Supp. 803 (E.D. Mich. 1977) has adopted the *Ford* rationale and required independent authorization for forcible entries to carry out an otherwise lawful oral interception order.

There can be no denial that a serious and irreconcilable conflict now exists among the circuits with respect to an important and sensitive area pertaining to Title III. There can be no question but that had petitioner been tried in the District of Columbia, the Fourth Circuit and probably the Eighth Circuit, the evidence would have been suppressed. It is unjust to litigants to permit incriminatory evidence to be admissible solely upon the fortuitous circumstance of venue. The issue presented is of great public interest and of enormous importance to petitioner and to the proper administration of Title III.

In opposing *certiorari* recently in *United States v. Scafidi, supra*, the Government represented that the problem presented may not be a recurring one inasmuch as the Department of Justice has recently instructed its supervising attorneys to seek explicit judicial approval for each contemplated break-in. Presumably, the Government will again seek to oppose *certiorari* on the same grounds. Anticipating such an argument, petitioner suggests that such a policy change is an inappropriate basis for denial of *certiorari*. First, it does not answer at all the argument that this petitioner has been subjected to an injustice. Second, it seems to concede the correctness of petitioner's position that such authorization must be obtained. The argument would be more seemly if coupled with a confession of error. Third, petitioner contends that prior judicial authorization for a break-in is a constitutional command; not simply an administrative matter which may subsequently be withdrawn or amended by administrative directive. Fourth, the number of similar cases in litigation at various stages may well far exceed the handful of reported opinions that have appeared to date. Fifth, irrespective of the position of the Department of Justice, this issue will

surely find its way into the federal system through state prosecutions since the impermissibility of an unauthorized break-in (assuming it is impermissible) is a violation of the Fourth Amendment.

Unlike *United States v. Scafidi, supra*, which has been so recently the subject of a denial of *certiorari*, this case presents the issue in a more straightforward manner. Here, there is but one aggrieved party with no issue as to standing. *Scafidi* involved numerous parties, only one of whom had any arguable standing to raise the issue of an illegal breaking and entry to install a listening device. Furthermore, the case at bar, unlike any of the other reported decisions, involves a situation where it is admitted the Government agents made no effort to apprise the supervising court, even informally, of their intention to commit a break and entry.

It is submitted that this case is the proper vehicle for resolution of an important issue which is ripe for decision.

II.

The decision below raises an important issue with respect to the supervisory powers of the courts in administering Title III and a question of first impression regarding statutory interpretation of an important aspect of Title III.

Title III imposes upon the courts a substantial responsibility in carrying out the congressional mandate. The proper role of a supervising judge is in doubt due to the conflict among the circuits. The court below, adopting the rationale of *United States v. Scafidi, supra*, was of the view that the statutory permission to eavesdrop electronically upon oral communications implied congressional approbation of break-ins without prior judicial approval. This reasoning is fallacious. Intercepting oral communications does not necessarily imply a

surreptitious entry. Modern technology permits the aural acquisition of conversations from great distances without necessitating physical intrusions in every case.⁴

The obvious deficiencies and dangers in the procedure adopted by the Government need only be alluded to in passing. In the case at bar, as noted, the Government made no attempt to advise the court that a break-in was contemplated. The agents received no instructions from anyone with respect to how they were to conduct themselves on the premises. After they broke into petitioner's premises, they filed no report and made no record of their activities. No judge evaluated the need for a break-in. Alternative avenues entailing less intrusive methods were never discussed; e.g., installation by way of a ruse or use of an informant or decoy. No affidavits or testimony were submitted to support the Government's desire to conduct a break and entry. No order was ever issued limiting the number of times the agents could enter, the number of agents to be on the premises, the amount of time the agents would be permitted to search the premises for "safety" reasons, the rights and duties of the agents while on the premises, the right to make subsequent entries to re-position, repair, maintain or remove the equipment, the right of the agents to be armed, the duty to advise local police of the break-in, the duty of Government attorneys to supervise the agents, or consideration of whether the premises would likely be vacant thereby lessening the chance of an unfortunate incident.

While it may be argued that it is not within the expertise of a federal judge to pass upon the methods selected by Government agents in carrying out their plans to electronically eavesdrop upon oral communications, the language of this Court in a slightly different setting is most appropriate:

4. See *Lopez v. United States*, 373 U.S. 427, 468, fn. 16 (Brennan, J., dissenting). See also *Silverman v. United States*, 365 U.S. 505, 508-09.

"We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly, courts can recognize that domestic security surveillance involves different considerations from the surveillance of 'ordinary crime.' If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance." *United States v. United States District Court*, 407 U.S. 297, 320.

Title III is silent as to obligations of the Government in securing an authorization to eavesdrop on oral communications where a break-in is contemplated or deemed necessary. Irrespective of the constitutional requirements, the courts in *Agrusa*, *Scafidi* (concurring opinion of Judge Gurfein) and even the court below all suggested that, in making Title III applications, the Government should apprise the supervising judge of the necessity to break in and the court should take it upon itself to make a decision whether to permit such an entry. But no guidance has been given to the courts as to what it is the district judge should do, other than say yes or no. It is essential that if such a duty is imposed upon the supervising court, either implicitly by Title III itself or by an independent supervisory duty, then the parameters of such supervision must be set out. The failure of this Court to set out specific guidelines will only result in jeopardizing future prosecutions. Even under the new Department of Justice guideline in which the court is to be apprised of the Government's intentions, there will be litigation dealing with the proper exercise of supervision by the court unless the issue is clarified by the Court in this case.

III.

The decision below raises an important question of first impression regarding the role of an appellate court in reviewing the alleged excessiveness of a sentence.

The petitioner was sentenced to two concurrent five-year terms of imprisonment. He had no prior criminal record. Of the seven individuals indicted as a result of the criminal transaction, only one other defendant had as limited a participation as petitioner and that individual was the person who actually stored the stolen goods. The only real distinction between petitioner and that other individual was that petitioner failed to plead guilty. He was tried and convicted on two of the five counts.

The apparent disparity in sentences should be grounds for some judicial review and explanation, if justified. When raised on appeal, the Government answered the contention with the following complete argument:

"Appellant contests as excessive the sentence imposed on him for the crimes which the jury found he committed.

That sentence being within the statutory limitation, it may not be reviewed by this court."

The court below dealt with the issue in a footnote, as follows:

"Appellant also maintains . . . that the trial court abused its discretion in sentencing Dalia to two five-year concurrent terms. We find no merit to these contentions."

There is no clear directive to the courts of appeals with respect to the scope of appeal of an allegedly excessive sentence. Certain recent cases have intimated that a remedy for an excessive sentence will lie if it rises to the level of "an abuse of discretion". *Woosley v. United States*, 478 F. 2d 139 (8 Cir. 1973); *United States v. Robin*, 545 F. 2d 775 (2 Cir. 1976). The Government in the case below took the position that any sentence within a statutory limit is not reviewable, citing *United States v. Lee*, 532 F. 2d 911 (3 Cir.), *cert. denied*, 429 U.S. 838 (1976) and *Government of the Virgin Islands v. Venzen*, 424 F. 2d 521 (3 Cir. 1970).

An issue of such significance to the public, to criminal defendants and to the administration of justice should be the subject of a definitive ruling by this Court.

CONCLUSION

For the foregoing reasons set forth above, it is submitted a writ of certiorari to the United States Court of Appeals for the Third Circuit should be issued.

Respectfully submitted,

s/ Louis A. Ruprecht
Attorney for Petitioner

APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 3, 1978

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-1277

UNITED STATES OF AMERICA,

Appellee

vs.

LAWRENCE DALIA,

Appellant

On Appeal From the United States District Court for the
District of New Jersey
(D.C. Crim. No. 75-488-1)

Argued January 5, 1978

Before: ROSENN and HIGGINBOTHAM, *Circuit Judges*, and
VanARTSDALEN, *District Judge**

Jonathan L. Goldstein,
United States Attorney
Maryanne T. Desmond,
Assistant U.S. Attorney

* Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

*Decision of the United States Court of Appeals for the Third
Circuit Dated May 3, 1978*

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OPINION OF THE COURT

(Filed May 3, 1978)

Higginbotham, *Circuit Judge*

The crucial issue before this Court in this appeal from a final judgment of conviction stems from the use of electronic surveillance to obtain evidence of Lawrence Dalia's complicity in the crimes of which he was found guilty. Dalia was found guilty under two counts of a five-count indictment for conspiracy to transport, receive and possess stolen goods in violation of 18 U.S.C. §371 (1970) and for receiving stolen goods while in interstate commerce in violation of 18 U.S.C. §§2, 2315 (1970). Dalia's co-defendant, Daniel Rizzo, pleaded guilty to the offenses charged in the indictment prior to the commencement of the trial. Five named co-conspirators were charged in a prior indictment and pleaded guilty to the charge of possessing goods stolen in interstate commerce in violation of 18 U.S.C. §659 (1970). These five individuals were arrested on April 5, 1973, by FBI agents who, in the execution of a search warrant, found the stolen 664 rolls of polyester fabric valued at approximately \$250,000. These rolls of fabric were the same goods underlying the offenses for which the appellant, Dalia, was convicted. Dalia was sentenced to serve two concurrent five-year terms.

*Decision of the United States Court of Appeals for the Third
Circuit Dated May 3, 1978*

I.

On March 14, 1973, Judge Frederick B. Lacey granted the United States Department of Justice authorization to intercept wire communications emanating from two telephones located in Dalia's business office pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.* The original order authorized wire interception for a period of twenty days. Upon the expiration of that order a new order was issued authorizing the interception of both wire *and* oral communications. The second order, issued April 5, 1973, provided that the Special Agents of the FBI were authorized to:

Intercept oral communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses at the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the north westernly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey.

By an order dated April 27, 1973, the authorization to intercept oral and wire communications was extended for a maximum of twenty days. Pursuant to these orders, two business phones used by Dalia were electronically surveilled and a hidden microphone was installed in his place of business. Each interception order directed the Department of Justice to provide the court with progress reports on the fifth, tenth and fifteenth days of surveillance. Finally, on May 16, 1973, the interception of wire and oral communications terminated.

*Decision of the United States Court of Appeals for the Third
Circuit Dated May 3, 1978*

Appellant's major contention on appeal to this Court pursuant to 28 U.S.C. §1291 is that an electronic listening device was unlawfully installed on his business premises by government agents after gaining entrance by surreptitious entry not explicitly authorized in the court's orders. Therefore, appellant argues, the trial judge erroneously denied his motion to suppress tapes obtained from the oral interception.¹ We agree with Judge Lacey that an order authorizing the interception of oral communications does not require explicit authorization for a forcible, surreptitious entry and we affirm.

II.

Appellant argues that the fourth amendment prohibits use of evidence obtained from an electronic listening device which agents installed in his premises after forcible and surreptitious entry without express judicial approval for such entry. In essence, the appellant contends that while the surveillance itself may be legally authorized by a search warrant, the legality of the break-in is entitled to separate fourth amendment scrutiny. Judge Lacey held that such explicit judicial approval of a break-in was not required when the surveillance was properly authorized.

1. Appellant also maintains that the supervising judge was misled by the government's progress reports and that the continuing electronic surveillance was unjustifiable, not so minimized as claimed by the government, and, presumably, lacking in probable cause. Appellant argues that the trial court erred in failing to interrogate a juror to determine whether the verdict was "tainted" by extraneous influences, that the disclosure of a privileged communication between Dalia and his wife to a grand jury that did not issue his indictment justifies the suppression of all electronically intercepted evidence and, finally, that the trial court abused its discretion in sentencing Dalia to two five-year concurrent terms. We find no merit to these contentions.

*Decision of the United States Court of Appeals for the Third
Circuit Dated May 3, 1978*

Since Judge Lacey filed his opinion, the Fourth, Second and D.C. Circuits have rendered decisions on the issue involved in this case. In *Application of United States for an Order Authorizing the Interception of Oral Communications*, 563 F.2d 637 (4th Cir. 1977), the court held that government agents could covertly enter private premises to install a listening device only after the district court had made an independent determination to allow such covert entry. 563 F.2d at 644. Similarly in *United States v. Ford*,² 553 F.2d 146 (D.C. Cir. 1977), in an opinion *per* Judge Skelly Wright, the court held that the Fourth Amendment required that government agents seek a valid warrant specifically authorizing surreptitious entry to install electronic surveillance devices. In *Ford, supra*, the court's order authorized surreptitious entry; however, the order was found invalid on its face because of overbreadth. 553 F.2d at 165. To the contrary, in *United States v. Scafidi*, 564 F.2d 633 (2d Cir. 1977), the Second Circuit held that implicit in a court order authorizing the interception of oral communications was the concomitant authorization to secretly enter the premises to install the electronic surveillance device.

2. *United States v. Finazzo*, 429 F. Supp. 803 (E.D. Mich. 1977), held that independent court authorization was required for covert entry to carry out an oral interception order. That court, in an opinion *per* now Circuit Judge Damon Keith, followed the analysis of *United States v. Ford, supra*, and the "reservations expressed by the Court of Appeals for the Eighth Circuit" in *United States v. Agrusa*, 541 F.2d 690 (8th Cir. 1976). In *Agrusa, supra*, the interception order contained express court authorization to break and enter. The court noted at 541 F.2d at 696 n. 13:

We do not decide what result obtains if the officers act without express court authorization to break and enter (although with court authorization to intercept). We are certain, however, that the resolution becomes much more difficult in that event, and we commend the procedures employed here to law enforcement officials in the future.

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[A]ny order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

We, therefore, hold that when an order has been made upon adequate proof as to the probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required. 564 F.2d at 640.

Judge Lacey found that in this case a surreptitious entry was within contemplation.

On this set of facts, I find that the safest and most successful method of accomplishing the installation of the wiretapping device was through breaking and entering the premises in question. Dalia in fact stated that, to the best of his knowledge, it would be impossible to install such a device in that location without gaining access to the building forcibly. Affidavit of Dalia at ¶ 4. In most cases the only form of installing such devices is through breaking and entering. The nature of the act is such that entry must be surreptitious and must not arouse suspicion, and

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the installation must be done without the knowledge of the residents or occupants.³

426 F. Supp. 862, 866 (1977).

We accept Judge Lacey's finding that a surreptitious entry was the most effective means for installing the interception device as well as his finding that the installation was based upon probable cause and executed in a reasonable fashion.

In rejecting appellant's contention in this case that separate authorization was required for the forcible surreptitious entry, we do not adopt a rule that specific authorization is never required. In the future, the more prudent or preferable approach for government agents would be to include a statement regarding the need of a surreptitious entry in a request for the interception of oral communications when a break-in is contemplated.⁴ This burden is minimal in light of the fourth amendment considerations that could be later raised.

3. When Dalia's counsel argued before the commencement of trial the need for greater court supervision in the covert installation of interception devices, Judge Lacey clarified, for the record, his involvement in the follow-up of his order. He stated that: (1) he did not discuss with the supervising attorney or the agents how the order would be carried out and gave no limiting instructions on this matter and (2) he did not discuss afterwards how the order was carried out or how entry was made. Consequently, we cannot affirmatively state that the record demonstrates that Judge Lacey was actually aware of the surreptitious entry; however, his opinion shows that he was cognizant that such surreptitious entry might be most appropriate.

4. When the request to intercept oral communications was made in 1973 in the instant case the Department of Justice was not on notice of any conflict among the circuits. Since that time, absent a Supreme Court decision, there has developed an irreconcilable conflict among the various courts of appeals.

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The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

s/ A. Leon Higginbotham
Circuit Judge

JUDGMENT DATED MAY 3, 1978

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 77-1277

UNITED STATES OF AMERICA

vs.

DALIA, LAWRENCE,

Appellant

(D.C. Criminal No. 75-488-1)

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE — DISTRICT OF NEW JERSEY**

**Present: ROSENN and HIGGINBOTHAM, Circuit Judges and
VANARTSDALEN, District Judge***

* Honorable Donald W. VanArtsdalen, United States District Judge for
the Eastern District of Pennsylvania, sitting by designation.

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Judgment Dated May 3, 1978

JUDGMENT

This cause came on to be heard on the record from the
United States District Court for the — District of New Jersey
and was argued by counsel on January 5, 1978.

On consideration whereof, it is now here ordered and
adjudged by this Court that the judgment of the said District
Court, filed January 27, 1977, be, and the same is hereby
affirmed.

ATTEST:

s/ Thomas (illegible)
Clerk

May 3, 1978

**PORTION OF DECISION OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
DATED JANUARY 11, 1977 RELATING TO
SURREPTITIOUS ENTRY**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal #75-488

UNITED STATES OF AMERICA,

Plaintiff

v.

LAWRENCE DALIA,

Defendant.

OPINION

By LACEY, J.

By an application dated March 14, 1973 the United States Department of Justice requested and received authorization to intercept telephonic conversations emanating from two telephones located on the business premises of defendant Lawrence Dalia.* On April 5, 1973 the Justice Department sought and received an extension of their authority to intercept wire communications of Dalia and others, and, on the same date, authority was acquired to commence oral interception at Dalia's office. Subsequently, on April 27, 1973 the final request for an extension of its eavesdropping authority was approved by the court. As a result of these orders, wire interception devices

* The application and authorization were made pursuant to 18 U.S.C. §2516.

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Surreptitious Entry*

were installed and did operate from March 15 to May 16, 1973, and an oral interception device was similarly installed and did operate between April 5 and May 16, 1973. The objective sought to be obtained by these interceptions was a determination of the scope of and participants in an alleged conspiracy involving theft from interstate shipments and interference with commerce.

An indictment charged this defendant with conspiracy and substantive crimes (18 U.S.C. §§371 and 2315) related to the theft and possession of an interstate shipment of textiles on or about April 3, 1973. On June 18, 1976 a jury verdict of guilty was returned.

In presenting its case against defendant Dalia, the government used the results of the aforementioned electronic surveillance. Defendant objected and moved to suppress the results of all illegal electronic surveillance and for an evidentiary hearing regarding the manner in which those oral and wire interceptions were accomplished. A post-trial evidentiary hearing was held on July 29, 1976.

In support of his motion, Dalia contends that those agents installing the device to intercept oral communications did unlawfully break and enter and trespass upon the premises of defendant, and by so doing did render any evidence obtained from that illegal entry inadmissible.

The bases for that contention are (1) that the government was required to seek judicial approval of an otherwise illegal breaking and entering for the purpose of installing an electronic eavesdropping device; (2) that such approval was neither sought nor obtained; and (3) that the use of evidence obtained from the oral interception device is contrary to the fourth amendment protection against unreasonable searches and seizures.

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Defendant's second contention is that the progress reports submitted by the government for extensions of time for the wire surveillance were falsified and if the court had known, no extensions would have been allowed. His final contention is that the tapes should be suppressed because the government failed to adhere to minimization requirements.

Defendant preliminarily argues that the statements of the government, as well as its special agent, that normal investigative procedures reasonably appeared unlikely to succeed if tried, failed to satisfy the "full and complete statement" requirements of 18 U.S.C. §2518(1)(c). The supporting affidavits submitted on April 5 and April 26, 1973, allegedly fell short of the elements enunciated by this court in *United States v. Falcone*, 364 F. Supp. 877, 889 (D.N.J. 1973), *aff'd*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975), in that the "applications for extensions offer very little toward a finding of the anticipated failure of standard methods of investigation." Defendant's Brief at 10. According to defendant, the government's sources could have verified the degree of involvement of defendant's co-conspirators and wiretapping was unnecessary. Additionally, it is argued, the agents, through wiretapping conversations pursuant to the original order, should have been able to pinpoint the locations or drops where stolen goods were stored so that continued eavesdropping was unnecessary.

In an application for a court-ordered electronic surveillance under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, *et seq.*, the government must present the court with

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a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .

18 U.S.C. §2518(1)(c). The court may then authorize the interception if it determines that

normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous

18 U.S.C. §2518(3)(c). The statutory burden on the government is not great in showing compliance with §2518(3)(c) and the government "need not prove to a certainty that normal investigative techniques will not succeed, but rather need only show that such techniques 'reasonably appear to be unlikely to succeed if tried.'" *United States v. Armocida*, 515 F.2d 29, 38 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975).

Sections 2518(1)(c) and (3)(c) must be read in a common sense fashion. S. Rep. No. 1097, 90th Con., 2d Sess., 1968 U.S. Code Cong. & Admin. News at 2112, 2190. *See also United States v. Armocida, supra*. They are designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. *United States v. Kahn*, 415 U.S. 143, 153 n. 12 (1974); *United States v. Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975). Their purpose "is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to

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inform the issuing judge of the difficulties involved in the use of conventional techniques." *United States v. Pacheco*, 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975).

I am in agreement with the Second Circuit in *United States v. Steinberg*, 525 F.2d 1126 (1975), *cert. denied*, 44 U.S.L.W. 3659 (U.S. May 18, 1976) that "[w]hen one endeavors to prove a negative, it is difficult to be very specific about it" and I am "loathe to set impossibly burdensome standards." *Id.* at 1130. See also *United States v. Falcone*, *supra*, 364 F. Supp. at 888-89; *United States v. Staino*, 358 F. Supp. 852, 856-57 (E.D. Pa. 1973). I am satisfied that the government has substantially complied with the statutory mandate.

The three probable cause affidavits that Special Agent Hokenstad submitted to me were facially sufficient for me to make a determination that alternative investigative measures had either been tried and failed, see *United States v. Robertson*, *supra*, reasonably appeared unlikely to succeed if tried, see *United States v. Armocida*, *supra*, 515 F.2d at 38, or were too dangerous to be used. *Id.* Defendant's allegations as to pinpointing locations and the use of sources are not supported by affidavit or any other materials and are mere speculation.

Defendant next contends that an applicant for an interception order is expected to request the approval of the court to break and enter in order to install the electronic device. The court, it is asserted, did not therefore pass upon the question of whether the authorized surveillance could be accomplished in some lesser manner.

In support of this argument, defendant relies upon the holding in *United States v. Ford*, 414 F. Supp. 879 (D.D.C.

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1976). In that case the ruse of two bomb scares at defendant's premises was used to gain entry by the government. The warrant had stated that "entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse and stratagem." *Id.* at 881-82. The court found the warrant to be invalid. It held that the issuing judge had a necessary role, under 18 U.S.C. §2518(4), in determining the manner of entry and that this role had been wrongfully and without direction assigned to the executing officers. The warrant was found to be facially overbroad and illegal. *Id.* at 884-85.

Defendant also relies upon the dicta of the court in *United States v. Agrusa*, No. 76-1036 (8th Cir. 1976), where the court approved interception of wire and oral communications conducted by means of a forcible and surreptitious entry because there was prior judicial direction to the officers to break and enter. The court stated, however, that:

we do not decide what result obtains if the officers act without express court authorization to break and enter (although with court authorization to intercept). We are certain, however, that the resolution becomes much more difficult in that event, and we commend the procedures employed here to law enforcement officials in the future.

Id. Slip Opinion at 11 n. 13.

Neither 18 U.S.C. §2518(4), which specifies the necessary contents of a Title III authorization order, nor Rule 41(c) of the Federal Rules of Criminal Procedure, which indicates that a

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warrant must identify the property, and name or describe the person or place to be searched, requires the court to direct the manner of entry.

Because the warrant for the seizure of oral communications was based on probable cause, the question becomes whether or not the manner of executing the warrant was unreasonable.

The majority of cases concerning the manner of entry pursuant to a warrant are framed in terms of whether or not the manner of entry and/or execution of the warrant were so excessive as to be unreasonable under the fourth amendment.

Thus where real property is involved, there is the general requirement that officers must give notice of their authority and purpose and be refused entry before they may break into the premises to be searched. 18 U.S.C. §3109. The general purposes of this requirement are to protect against unnecessary breaches of the peace, and prevent embarrassing sudden exposure of private activities. See *United States v. Bustamante-Gamez*, 488 F.2d 4, 11-12 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974).

In *United States v. Gervato*, 474 F.2d 40 (3d Cir.), cert. denied, 414 U.S. 864 (1973), the court held that there is also no requirement that the premises be occupied at the time of a search. In *Gervato*, the agent knew by surveillance that the premises were unoccupied. The agent forced open the door and conducted the authorized search. The court, in its analysis, outlined the history of the fourth amendment and indicated that its primary purpose was to put an end to general searches and warrants, i.e., to insure that the place and property to be seized were particularly described. *Id.* at 41-44.

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It should be noted that there was no indication in *Gervato* that the agent should have received a court order to "break and enter" the premises.

The reasonableness of the manner of carrying out a search has also been considered in relation to body searches. Even in such searches involving intrusions into the human body, there is no requirement that prior judicial authorization be required. In *United States v. Mastberg*, 503 F.2d 465 (9th Cir. 1974), the court found that "real suspicion" and not independent judicial authorization is sufficient for a vaginal body-cavity search.

In *Rochin v. People of California*, 342 U.S. 165 (1952), it was held that stomach pumping evidence should be suppressed because it "shocked the conscience of the Court" and offended its source of decency and not because of lack of prior judicial authorization.

The affidavits which supported the application for the warrant in question indicated that resort to electronic surveillance, to overhear meetings at Dalia's office and conversations on Dalia's telephones, was required to identify the sources of Dalia's stolen goods, those working with him to transport and store stolen property, and the scope of the conspiracy. Oral evidence of this criminal enterprise was only available inside Dalia's business premises. On this set of facts, I find that the safest and most successful method of accomplishing the installation of the wiretapping device was through breaking and entering the premises in question. Dalia in fact stated that, to the best of his knowledge, it would be impossible to install such a device in that location without gaining access to the building forcibly. Affidavit of Dalia at ¶ 4. In most cases the only form of installing such devices is through breaking and

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entering. The nature of the act is such that entry must be surreptitious and must not arouse suspicion, and the installation must be done with the knowledge of the residents or occupants.

Once a showing of probable cause is made to support the issuance of a court order authorizing electronic surveillance, thereby sanctioning the serious intrusion caused by interception, implicit in the court's order is concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment. See *United States v. Altese*, Crim. No. 75-341, slip op. at 52 (E.D.N.Y. Oct. 14, 1976). The court in *Altese* held that:

Entry to install bugging devices is but a mere condition precedent that must necessarily be satisfied if the purpose behind an intercept order is to be effectuated. Entry to initiate surveillance is not another intrusion. Hence there need not be express authorization in the intercept order that issues for that prerequisite.

Id. at 53. I agree with this rationale and find that under these circumstances, notwithstanding the decision in *Ford*, it was not necessary for the government to obtain explicit judicial approval of an otherwise illegal breaking and entering for the purpose of installing an electronic eavesdropping device.

* * *